



## State of New Hampshire

### PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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HILLSBOROUGH COUNTY,  
NURSING HOME

Complainant

v.

AFSCME, LOCAL 2715

Respondent

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CASE NO. A-0426:38

DECISION NO. 97-052

#### APPEARANCES

##### Representing Hillsborough County Nursing Home:

Carolyn Kirby, Esq.

##### Representing AFSCME, Local 2715:

James C. Anderson, Staff Rep.

##### Also appearing:

Gloria Plowell, AFSCME, Local 2715  
Fred Hicks, AFSCME, Local 2715  
Emily Mercier, Hillsborough County  
Jim Hecker, Fitz Vogt & Associates  
Mark Liacos, Hillsborough County

#### BACKGROUND

Hillsborough County (County), on behalf of the Hillsborough County Nursing Home (HCNH) which it owns and operates, filed unfair labor practice (ULP) charges against the American Federation of State, County and Local Employees (AFSCME), Local

2715 (collectively "Union") on March 3, 1997 alleging violations of RSA 273-A:5 II (f) and (g) resulting from the Union's attempt to grieve and arbitrate the non-filling and non-posting of a Cook II position vacancy within the bargaining unit, in violation of Article VII of the collective bargaining agreement (CBA). The Union filed its answer on March 14, 1997, perfected by a supplemental filing on March 20, 1997 with sufficient copies being provided at that time. After a continuance sought and granted for an April 3, 1997 hearing date, this matter was heard by the PELRB on May 8, 1997.

#### FINDINGS OF FACT

1. Hillsborough County owns and operates the Hillsborough County Nursing Home, employs personnel, and thus is a "public employer" within the meaning of RSA 273-A:1 X.
2. The American Federation of State County and Municipal Employees, Council 93, Local 2715, is the duly certified bargaining agent for non-management, non-supervisory employees employed at HCNEH, said job categories being identified at Articles 1.1 and 18.1 of the CBA, inclusive of Food Service Workers I and II and Cooks I and II.
3. The Union and the County are parties to a CBA for the period July 1, 1992 to June 30, 1995 and continuing under the *status quo* doctrine thereafter. Article XVI of that contract contains the grievance procedure, which ends in final and binding arbitration. Article 16.2. A grievance is defined as "a complaint or claim by an employee or group of employees in the bargaining unit or the Union specifying the names of the bargaining unit employees involved, the date(s) of the alleged offense(s) and the specific contract provision(s) involved which arises under and during the terms of this Agreement."
4. Nursing Home Administrator Emily Mercier testified that HCNEH received an adverse federal evaluation in July of 1995. One of the corrective measures implemented to address this concern was to eliminate two Cook II positions, both part of the bargaining

unit. One Cook II was eliminated in the spring of 1996. The incumbent in that position "bumped" to another position. A second Cook II position retired at the end of December, 1996, after announcing the intent to do so in November of 1996. The second Cook II position, according to Mercier, remains on the books, unfunded and unfilled. Using proceeds from the elimination/non-filling of the two Cook II positions, HCNH entered into a contract with Fitz-Vogt, its food service contractor, in December of 1996, to create and hire a Dietary Operations Manager position, one that would be an employee of the contractor.

5. On November 20, 1996, the Union filed a "class action" grievance citing that the "contract [was] violated including Article VII" and sought as relief "to have Cook II position posted and be made whole." County Exhibit No. 2.
6. There is an overlap in job content between the duties of the Dietary Operations Manager and Cook II positions as verified by Fitz-Vogt Vice President James Hecker. He said the Operations Manager is intended to supplement, not replace, work done by bargaining unit positions. By way of example of such overlaps, the Operations Manager schedules and assigns work of kitchen personnel, sets up and supervises food service lines, inspects and checks all dining room and kitchen equipment for safety and cleanliness, and directs the cleaning of dining room and kitchen. (Compare Union Exhibit No. 2, County Exhibit No. 1 and James Hecker testimony.) Both the Operations Manager and the Cook II are intended to fill in for subordinates, i.e. for the Cook I and Food Service I and II positions. The Operations Manager has more authority than the Cook II because he/she can make decisions without the approval of the Food Service Director. According to Hecker, the implementation of the Operation Manager's position eliminated the need for a Cook II on the 11 to 7 shift.
7. Article VII of the CBA consists of seven (7) sections. Article 7.1, used by the County to defend its non-

filling of the unfunded and unfilled Cook II position, provides in pertinent part:

If a permanent job opening or permanent vacancy occurs in a job classification set forth in Article 18.1 and covered by this Agreement, and the Division determines to fill such openings, the open job will be posted for a period of five (5) administrative work days (Monday through Friday, excluding Saturdays, Sundays and holidays). The notice of the open job shall contain a brief description of the job and its rate of pay. Permanent full-time employees covered by the Agreement who desire such open job may submit their application for such job to the Administrator of the Nursing Home in writing within the five (5) day posting period. (Emphasis Added.)

Article 7.5 of the contract makes provisions for those times when employees are temporarily assigned to higher or lower job classifications. This is also known as a "plus rate" and was acknowledged in Mercier's testimony. The CBA provides:

An employee covered by this Agreement may be temporarily assigned to the work of any position of the same or lower job classification pay grade with out any change in in pay. Upon the termination of such temporary assignment, such employee shall be returned to his or her original job classification.

If an assignment to a lower job classification pay grade is made due to a layoff or reduction of personnel, pursuant to the seniority 'bumping' provision in Article VI, Section 5 then the employee's pay grade for such assignment shall be the wage rate assigned to the lower job classification.

When an employee is temporarily assigned to work in a higher job classification or pay grade for a period of one full work day or longer, such

employee shall receive the rate of the higher pay grade during such temporary assignment. Upon the termination of such temporary assignment, such employee shall be returned to his or her original job classification at his or her original rate of pay prior to the temporary assignment.

The elimination or non-filling of Cook II positions will reduce the opportunities for Cook I's or Food Service Workers I and II to work in that higher job classification.

8. The County relies on RSA 273-A:1 XI and Article 7.1 for its right to restructure its operations and work force as well as for its right to determine not to fill certain Cook II position vacancies. The Union claims that this is not merely a posting vacancy as suggested by the County, says the County's decision has an impact throughout Article VII and the CBA, and wants to engage in impact bargaining over the charge. The Union has not contested the County's right to create the Operations Manager position with its food service contractor nor has it filed an unfair labor practice charge based on the County's refusal to bargain issues of impact.

#### DECISION AND ORDER

As noted in our findings (No. 8), we are confronted with only one issue in this case: Did the Union breach the CBA when it filed and subsequently attempted to arbitrate its class action grievance (County Exhibit No. 2) of November 20, 1996? We find that it did not.

The Union, during its presentation to the PELRB, stated that it has not challenged and never intended to suggest that it was challenging the County's right to create the Dietary Operations Manager position under the control and direction of Fitz-Vogt. As asserted by the County, that is protected by RSA 273-A:1, XI relative to organizational structure as well as the direction, number and control of the work force. Article VII, Section 1 of the CBA speaks to the issue of whether the "Division," presumably the dietary department, decides or "determines to fill such openings" or vacancies. Finding No. 7.

Thus, the non-funding and non-filling of a Cook II position is protected by the contract, too.

In its grievance, the Union asserts a violation of Article VII without further specification. We heard discussion that this was a "posting grievance," but neither in its pleadings, following paragraph 15 thereof, nor in its argument at the conclusion of the hearing did the Union suggest that it was so limited. There is no evidence that the Union waived any other claims it may have had under Article VII.

In deciding improper attempts to arbitrate cases, we are bound by Appeal of Westmoreland School Board, 132 N.H. 103 (1989) and Appeal of City of Nashua School Board, 132 N.H. 699 (1990). In order for us to stay arbitration proceedings, in our role as gatekeeper to that process, there must be "positive assurance" that the subject matter of the grievance "is not susceptible of a reading that will cover the dispute." 132 N.H. 699 at 701 (1990). Given the breadth of the provisions of Article VII, as exhibited, in part, by Finding No. 7, above, we cannot find that such "positive assurance" exists. Under Westmoreland, supra, when a CBA contains an arbitration clause, a presumption of arbitrability exists...[and] only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." Since Article VII contains more than Section 1 and since there are other than posting claims that may be asserted thereunder, that "forceful evidence" simply was not present in this case.

The ULP is DISMISSED.

So ordered.

Signed this 16th day of May, 1997.

  
 EDWARD J. HASELTINE  
 Chairman

By unanimous vote. Chairman Edward J. Haseltine presiding.  
 Members E. Vincent Hall and Seymour Osman present and voting.